

EXHIBIT 6

Eugene Volokh, "Texas AG: Lawyer speech code
proposed by American Bar Association
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The Volokh Conspiracy • Opinion

Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment

By **Eugene Volokh** December 20, 2016

From today's [Texas Attorney General Opinion No. KP-0123](#) (case citations omitted):

In August of 2016, the ABA House of Delegates amended Model Rule 8.4 to add subsection (g), which provides that it is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with

Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Two comments relevant to subsection (g) were also added to the Rule:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. ...

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[T]he Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.

A court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar.

... Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

While decisions of the United States Supreme Court have concluded that

an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is "related to the practice of law" [including, among other things,] ... ["participating in bar association, business or social activities in connection with the practice of law.["] Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.

One commentator [Prof. Ron Rotunda] has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime," could be subject to discipline under Model Rule 8.4(g). In the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues....

A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's First Amendment right to free exercise of religion.

Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups. For example, in the same sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." The Court has further encouraged "an open and searching debate" on the

issue.

However, operation of Model Rule 8.4(g) would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely result in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. If an individual takes an action based on a sincerely-held religious belief and is sued for doing so, an attorney may be unwilling to represent that client in court for fear of being accused of discrimination under the rule. “[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment.” Given that Model Rule 8.4(g) attempts to do so, a court would likely conclude that it is unconstitutional.

A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney’s right to freedom of association.

“[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” “This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.” Contrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney’s freedom to associate with a number of political, social, or religious legal organizations.

The Rule applies to an attorney’s participation in “business or social activities in connection with the practice of law.” Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline. In addition, a number of other legal organizations advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital

status, or socioeconomic status. Were Texas to adopt Model Rule 8.4(g), it would likely inhibit attorneys' participation in these organizations and could be applied to unduly restrict their freedom of association. ·

Because Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad.

An overbroad statute “sweeps within its scope a wide range of both protected and non protected expressive activity.” ... In the First Amendment context, a court will invalidate a statute as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” ...

Like those examples discussed above, numerous scenarios exist of how the rule could be applied to significantly infringe on the First Amendment rights of all members of the State Bar. A statute “found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute.” Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable.

As applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness.

... Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it is therefore likely to be found vague. In particular, the phrase “conduct related to the practice of law,” while defined to some extent by the comment, still lacks sufficient specificity to understand what conduct is included and therefore “has the potential to chill some protected expression” by not defining the prohibited conduct with clarity.

Also, the rule prohibits “discrimination” without clarifying whether it is

limited to unlawful discrimination or extends to otherwise lawful conduct. It prohibits “harassment” without a clear definition to determine what conduct is or is not harassing. And it specifically protects “legitimate advice or advocacy consistent with these Rules” but does not provide any standard by which to determine what advice is or is not legitimate. Each of these unclear terms leave Model Rule 8.4(g) open to invalidation on vagueness grounds as applied to specific circumstances.

The Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.

Multiple aspects of Model Rule 8.4(g) present serious constitutional concerns that would likely result in its invalidation by a court. The Texas Disciplinary Rules of Professional Conduct, on the other hand, already address issues of attorney discrimination through narrower language that provides better clarification about the conduct prescribed. Texas Disciplinary Rule of Professional Conduct 5.08 provides:

(a) A lawyer shall not willfully, *in connection with an adjudicatory proceeding*, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation *towards any person involved in that proceeding in any capacity* [emphasis added –EV].

(b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

is necessary in order to address any substantive or procedural issues raised in the proceeding; and

is conducted in conformity with applicable rulings and orders of a

tribunal and applicable rules of practice and procedure.

Model Rule 8.4(g) is therefore unnecessary to protect against prohibited discrimination in this State, and were it to be adopted, a court would likely invalidate it as unconstitutional.

Summary

A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness.

I'm very glad to see this, and I particularly agree with the free speech conclusion. Here's an excerpt from a comment that I submitted to the Texas AG's office during the public comments period, which discusses the free speech issue in more detail:

[Say] that some lawyers put on a Continuing Legal Education event that included a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state bar:

1. He has engaged in "verbal ... conduct" that "manifests bias or prejudice" toward gays, Muslims, or transgender people.
2. Some people view such statements as "harmful"; those people may well include bar authorities.
3. This was done in an activity "in connection with the practice of law," a Continuing Legal Education event. (The event could also be a bar activity,

if it's organized through a local bar association, or a business activity.)

4. The statement isn't about one person in particular (though it could be — say the debater says something critical about a specific political activist or religious figure based on that person's sexual orientation, religion or gender identity). But "anti-harassment ... case law" has read "harassment" as potentially covering statements that are offensive to a group generally, even when they aren't said to or about a particular offended person. *See, e.g., Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers' wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for factfinding on whether coworker's repeatedly wearing cap with "Don't Tread On Me" flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizegi v. First Nat'l Bank*, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee's posting a photograph of the Ayatollah Khomeini and another "of an American flag burning in Iran" in his own cubicle as potentially "national-origin harassment" of coworkers who see the photographs). And the rule is broad enough to cover statements about "others" as groups and not just as individuals.

Indeed, one of the comments to the rule originally read "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups." But the italicized text was deleted, further reaffirming that the statement doesn't have to be focused on any particular person.

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage,

restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal ... conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The State Bar, if it adopts the Rule, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.

This goes well beyond Texas Disciplinary Rule of Professional Conduct 5.08, which bans manifesting bias or prejudice only "in connection with an adjudicatory proceeding," and the rules in other states, which bar discrimination and harassment when they are "prejudicial to the administration of justice." See, e.g., Ariz. Rules of Prof. Conduct 8.4 Comment. Courts and the bar can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the ABA proposal deliberately goes vastly beyond such narrow restrictions, to apply even to "social activities."

The ABA proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.") (dictum); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.") (quoting *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir 2001) (Alito, J.)). But in most states, harassment law doesn't include sexual orientation, gender identity, marital status, or

socioeconomic status. It also generally doesn't cover social activities at which coworkers aren't present — but under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it's limited to speech that is so "severe or pervasive" that it creates an "offensive work environment." This proposed rule conspicuously omits any such limitation. Though the provision that "anti-harassment ... case law may guide application of paragraph (g)" might be seen as implicitly incorporating a "severe or pervasive" requirement, that's not at all clear: That provision says only that the anti-harassment case law "may guide" the interpretation of the rule, and in any event the language of paragraph (g) seems to cover any "harmful verbal ... conduct," including isolated statements.

Many people pointed out possible problems with this proposed rule — yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. My inference is that the ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of. I hope that Texas, consistently with the First Amendment, rejects such a restriction on constitutionally protected speech.

 **90 Comments**

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and an intensive editing workshop at UCLA School of Law, where he has also often taught copyright law, criminal law, tort law, and a seminar on firearms regulation policy.

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